1997

State of Utah v. Lisa Deherrera : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee	:	Case No. 970229-CA
vs.	:	
LISA DEHERRERA,	:	Priority No. 2
Defendant/Appellant	:	

REPLY BRIEF OF APPELLANT

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APPEAL FROM A CONVICTION FOR POSSESSION OR USE OF METHAMPHETAMINE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § § 58-37-8(2)(a)(1) 1953 AS AMENDED, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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ARGUMENT

POINT I

THE STATE CONCEDED THAT DEPUTY SHIVERDECKER CONDUCTED AN UNLAWFUL TERRY FRISK OF DEFENDANT IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The only argument in Appellee's brief responding to Appellant's contention that the Terry frisk was not supported by reasonable suspicion is a footnote. Appellee's Br. at 3, n.1. The State argues that the issue of the unlawful Terry search of Appellant's person is not properly preserved for appeal. Id. However, implicit in Defendant's preservation of the illegal actions of the Utah County Sheriff's Office at the roadblock in question is the preservation of the issue relating to the unlawful search of Appellant at the roadblock. (R. 41-82, 113, 118-119). The State did not factually dispute the unlawful Terry search of Appellant, and thereby, conceded to Appellant's arguments on this point. Therefore, this Court should reverse the trial court's denial of Appellant's motion to suppress on the basis that regardless of whether she was legally stopped, Deputy Shiverdecker did not have reasonable suspicion that Appellant posed a danger to

officer safety which would justify a Terry frisk, and that the scope of Deputy Shiverdecker's search of Appellant exceeded the scope of a Terry frisk. See Appellant's Br. at 41-45 (citing: Terry v. Ohio, 392 U.S. 1 (1968); State v. Rochell, 850 P.2d 480 (Utah App. 1993);State v. Carter, 812 P.2d 460 (Utah 1991); State v. Deitman, 739 P.2d 616 (Utah 1987)).

POINT II

THIS COURT SHOULD CONSIDER APPELLANT'S CHALLENGES TO THE CONSTITUTIONALITY OF THE CHECKPOINT STATUTE.

Additionally, the State argues in its brief that this Court should not address Appellant's challenges to the constitutionality of the Administrative Traffic Checkpoint Act (Utah Code Annotated §§ 77-23-101 thru 77-23-105 (1953 as amended)), hereinafter ATCA. Appellee's Br. at 11-12. However, if this Court were to accept the State's assertion, the constitutionality of ATCA would perhaps forever evade constitutional challenge. The State argues: "On appeal, the ***State does challenge the court's ruling on the plan's unconstitutional noncompliance with the statute***. The issue of good faith is independent of the statute's constitutionality and determines the outcome of the case." Appellee's Br. at 12 (emphasis added). Thus, pursuant to the State's argument, the constitutionality of ATCA will essentially never be ripe for review, because the issue will always be able to be decided on a good faith analysis. Appellant asserts that the constitutional issue in the case at bar is similar to the circumstance where appellate courts address issues which are technically moot, but the issue will likely recur, and is capable of evading review. Wickham v. Fisher, 629 P.2d 896 (Utah 1981); See also Roe v. Wade, 410 U.S.

113 (1973). Therefore, Appellant requests this Court to review the constitionality of ATCA under the Fourth Amendment of the United States Constitution and Article I, § 14 of the Utah Constitution.

Additionally, because at the present time, neither the Utah Supreme Court nor the Utah Legislature has adopted the good faith exception to the exclusionary rule, this Court must at least review the constitutionality of ATCA under Article I, § 14 of the Utah Constitution. Where the good faith exception to the warrant requirement does not presently exist under Article I, § 14, the only means of resolution of the issues before this Court require a constitutional analysis of ATCA pursuant to Article I, § 14 of the Utah Constitution.

POINT III

THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE LEON GOOD FAITH EXCEPTION APPLIED TO THE CIRCUMSTANCES OF THE PRESENT CASE.

In Appellee's brief, the State ultimately conceded that the Leon [United States v. Leon, 468 U.S. 897 (1984)] good faith exception does not apply to the present case: "While Leon expressly limited that decision to the good faith execution of judicially *authorized searches only, its rationale has been more fully* developed in Illinois v. Krull [Illinois v. Krull, 480 U.S. 340 (1987)]." Appellee's Br. at 15. In the present case, it is undisputed that the officers did not stop and search defendant pursuant to a warrant supported by judicial determination of *probable cause. Thus, the only possible argument that the good* faith exception applied to the facts of the present case, is

according to the expanded good faith exception pursuant to the holding in Krull, 480 U.S. 340.

However, upon careful review, this court should determine that even the expanded good faith exception in Krull does not salvage the conduct of law enforcement personnel in the present case. The holding in Krull addressed the following issue:

> [W]hether a similar exception [to the Leon exception] to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment."

Krull, 480 U.S. at 342. The majority of the Court in Krull ultimately held that although the statute in question was held to be unconstitutional, the officer "relied, in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search of respondents' business." Id. at 360. The present case is distinguishable from Krull in at least two significant points: (1) in the present case, the trial court found that the officers did not follow the requirements of the statute in question providing for administrative traffic checkpoints; (R. at 106, 107) and (2) the statute at issue, ATCA, has not yet been found to be unconstitutional. In order for the extended good faith exception as created by Krull to apply, officers must follow the requirements of the statute on which they purport to justify their actions. Krull, 480 U.S. at 349. Furthermore, the statute must subsequently be deemed unconstitutional, or the necessity for an expanded good faith exception would never arise. Id. at 360.

Therefore, as the State conceded, the good faith exception as created in Leon, 468 U.S. 897 does not apply to the facts of the

present case, and as discussed above, the expanded good faith exception pursuant to Krull, 480 U.S. 340 is also inapplicable. The trial court's holding that the good faith exception to the exclusionary rule pursuant to the Fourth Amendment applies to the facts of the present case was not correct, and this court should reverse the trial court's ruling and remand this matter for further proceedings.

Furthermore, as the State conceded in its brief, the court in Krull "noted that the good faith exception might not apply if an officer erroneously, although in good faith, acted outside the scope of a statute." Appellee's Br. at 18 (citing: Krull, 480 U.S. at 360 n.17). Thus, even if the Court were to agree with the State that the Krull good faith exception applies to the facts of the present case, the fact that the trial court held that the officer's actions, even if they were in good faith, were outside the scope of the statute. (R. 106, 107). In other words, even if the Utah County Sheriff's Officers acted in good faith reliance on the magistrate's approval of their roadblock plan, the trial court still determined that their actions were not in conformity with ATCA (R. 106, 107), and therefore, the good faith exception to the exclusionary rule does not apply.

POINT IV

THE UTAH COUNTY SHERIFF'S OFFICE AND THE UTAH COUNTY ATTORNEY'S OFFICE DID NOT ACT IN GOOD FAITH

The State would have this Court find that substantial good faith is enough good faith for the good faith exception to the exclusionary rule to apply. (Appellee's Br. at 19-29). However, circumstances which "almost" satisfy an exception to the warrant

requirement is wholly inadequate to overcome the *per se* unreasonableness of warrantless searches. State v. Wells, 928 P.2d 386 (Utah App. 1996); State v. Brown, 853 P.2d 851 (Utah 1992); and Katz v. United States, 389 U.S. 347 (1967). Exceptions to the warrant requirement are narrowly drawn. See Terry v. Ohio, 392 U.S. 1 (1968); State v. Roybal, 716 P.2d 291 (Utah 1986). The United States Supreme Court stated, "[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn." Jones v. United States, 357 U.S. 493 (1958).

In State in Interest of A.R., 937 P.2d 1037 (Utah App. 1997), this Court stated that the good faith exception is one of the limited exceptions to the warrant requirement. Id. at 1044 n.7. The State's assertion that substantial good faith is sufficient to qualify as an exception to the warrant requirement and the application of the exclusionary rule is completely contrary to the narrowly, carefully, and jealously carved exceptions to the requirement that officers obtain a warrant prior to stopping and seizing people in our country.

Furthermore, the mere substantial compliance with the requirements of ATCA was due to the choice of the Utah County Sheriff's Office and the Utah County Attorney's Office. The original roadblock plan submitted to the magistrate by the Utah County Attorney's Office and the Utah County Sheriff's Office only partially complied with the requirements of ATCA. (SR. 1-39). However, even the degree of partial compliance with ATCA decreased over the period of years in which the original plan was amended numerous times until the amendment which was in effect at the time Appellant was stopped at the roadblock. (SR. 53-79). The fact that

the Utah County Sheriff's Office and Utah County Attorney's Office were able to get magistrates to rubber-stamp the original roadblock plan together with numerous amendments which only partially complied with ATCA does not justify application of the good faith exception. Leon, 468 U.S. 919 n.20; Krull, 480 U.S. at 355.

Where the Utah County Sheriff's Office and Utah County Attorney's Office invited the magistrates to erroneously rubber-stamp roadblock plans which only partially complied with ATCA, they cannot now claim that they acted in good faith because the magistrate accepted their invitation to approve a plan based only on partial compliance. It is incongruent and inherent bad faith on the part of the Utah County Attorney's Office and Utah County Sheriff's Office to invite error on the part of a magistrate, and subsequently, claim that they reasonably relied on the magistrate's finding that the roadblock plan was sufficient under ATCA even though it only partially complied with ATCA's requirements. This Court should not permit the State to rely on invited error. State v. Blubaugh, 904 P.2d 688, 700 (Utah App. 1995); State v. Emmett, 839 P.2d 781, 788 (Utah 1992); State v. Barella, 714 P.2d 287, 288 (Utah 1986).

Even if the State's compliance with ATCA rises to the level of substantial rather than simply partial compliance, it is not *sufficient to justify the finding that the good faith exception to* the warrant requirement is applicable, and this Court should reverse the trial court's finding of good faith.

Additionally, the trial court specifically found that the actions of the Utah County Sheriff personnel operating the roadblock in question exceeded the scope of permissible roadblocks

as articulated by the U.S. Supreme Court in Michigan v. Sitz, 496 U.S. 444 (1990). (R. 106-107). Thus, under the objective reasonable officer standard of good faith, the officers in the present case either knew or should have known that the roadblock which they were conducting far exceeded the brief detention and inquiry to look for signs of impairment authorized in Sitz. Id. at 447-55. This Court should not find that the Utah County Sheriff's Office acted in good faith in conducting the roadblock in question.

POINT V

THE TRIAL COURT DID NOT FIND THAT DEFENDANT FAILED TO ARTICULATE A POLICY-BASED REASON TO CONSIDER AN INDEPENDENT ANALYSIS UNDER THE STATE CONSTITUTION AND TO THEREBY REJECT THE GOOD FAITH EXCEPTION.

The State argues in its brief that because the trial court did not address the state constitutional arguments made by Appellant, "the trial court implicitly concluded that defendant failed to articulate a policy-based reason to depart from federal law, and, thus, properly refused to construe a good faith exception to the state exclusionary rule different from the federal good faith exception." Appellee's Br. at 30. The State's argument is wild speculation. If any conclusion were to be drawn by the trial court's silence on Appellant's arguments relative to a separate analysis pursuant to Article I, § 14 of the Utah Constitution from the analysis pursuant to the Fourth Amendment, such a conclusion would be that the trial court considered the independent State constitutional analysis and determined that although the analysis is separate and distinct, the result is the same. Appellant maintains that the arguments made before the trial court and in Appellant's Brief asserting a separate and distinct analysis of the

roadblock issues pursuant to Article I, § 14 of the Utah Constitution should be reviewed by this Court for correctness. State v. Deli, 861 P.2d 431, 433 (Utah 1993). If this Court is reluctant to review Appellant's arguments pursuant to Article I, § 14, then Appellant would request that this issue be remanded to the trial court for further findings of fact and conclusions of law.

POINT VI

BECAUSE UTAH APPELLATE COURTS HAVE NEVER RECOGNIZED A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE PURSUANT TO ARTICLE I, § 14 OF THE UTAH CONSTITUTION, THE TRIAL COURT'S RULING SHOULD BE REVERSED.

The Utah Supreme Court has never recognized a good faith exception to the exclusionary rule pursuant to Article I, § 14 of the Utah Constitution. State v. Rowe, 806 P.2d 730 (Utah App. 1991), rev'd in part, 850 P.2d 427 (Utah 1992); State v. Larocco, 294 P.2d 460, 473(Utah 1990); State v. Mendoza, 748 P.2d 181, 187 (Utah 1987) (Zimmerman, J., concurring). The State cites cases such as State v. Chapman, 921 P.2d 446 (Utah 1995) in an attempt to argue that Utah appellate courts have adopted the good faith exception to the exclusionary rule. However, Chapman, and all other cases in Utah which have affirmatively applied a good faith analysis, have done so pursuant to a Fourth Amendment analysis. Appellant is unaware of any case in Utah which has addressed the good faith exception pursuant to Article I, §14 of the Utah Constitution. Therefore, at the present time, there is no good faith exception to exclusion of evidence when a police officer's violates a person's rights under Article I, §14.

The State argues in its brief, "Indeed, this Court, as an intermediate court of appeals, is not even the proper forum to

decide whether Utah lacks a good faith exception comparable to the federal exception. . . ." Appellee's Br. at 34. Because there presently does not exist a good faith exception under Article I, §14 of the Utah Constitution, and the State concedes that this Court is not the proper forum to create such an exception, then the trial court is certainly not the forum to create a good faith exception under Article I, §14. Therefore, the trial court erred in not granting Appellant's motion to suppress based on the fact that the trial court clearly found that the officer's actions in the present case were unconstitutional (R. 6-7), and absent a good faith exception pursuant to Article I, §14 exclusion of the evidence is the only proper remedy. State v. Thompson, 810 P.2d 415 (Utah 1991).

POINT VII

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE ADOPTED PURSUANT TO ARTICLE I, §14 OF THE UTAH CONSTITUTION.

In State v. Anderson, 910 P.2d 1229 (Utah 1996), the Utah Supreme Court stated, ". . .Utah courts should construe article I, §14 in a manner similar to constructions of the Fourth Amendment except in compelling circumstances." Id. at 1235. According to the arguments in Appellant's Brief, Appellant asserts that both the good faith exceptions pursuant to Leon, 468 U.S. 897 and Krull, 480 U.S. 340 present the type of compelling circumstances which justify Utah Courts in diverging from Fourth Amendment analysis and resorting to the State Constitution as approximately 14 other states have done in striking down the good faith exception under its respective state constitution.

Additionally, at least one State, Illinois, while accepting the good faith exception pursuant to Leon, 468 U.S. 897, declined to accept the expanded good faith exception pursuant to Krull, 480 U.S. 340 (more state's are almost certain to follow):

> We are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. We are particularly disturbed by the fact that such a grace period could last for several years and affect large numbers of people. This is simply too high a price for our citizens to pay. We therefore conclude that article I, section 6, of the Illinois Constitution of 1970 prohibits the application of Krull's extended good-faith exception to our state exclusionary rule.
>
> . . .
>
> [W]e note that our decision today does not impact the Leon good-faith exception. . . .[O]ne can fully accept the rationale and result in Leon while rejecting the rationale and result in Krull. This is precisely what Justice O'Connor did in her dissent in Krull.

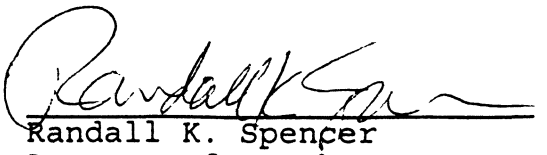
People v. Krueger, 675 N.E.2d 604 (Ill. 1996).

Due to the compelling circumstances relative to the good faith exception and the confusion that is created when reviewing courts are forced to "entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant," Leon, 468 U.S. at 959 (Brennan J., dissenting) Utah Appellate courts should decline to adopt the good faith exceptions created in Leon, 468 U.S. 897 and Krull, 480 U.S. 340.

CONCLUSION AND PRECISE RELIEF SOUGHT

For all of the reasons set forth in Appellant's Brief and Appellant's Reply Brief, this court should reverse the trial court's denial of defendant's motion to suppress and remand this case to the Fourth District Court with directions to suppress the evidence and dismiss the charge.

Respectfully submitted this 20th day of January, 1998.



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Mailing Certificate

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant this 20th day of January, 1998 to the following: Kenneth A. Bronston, Assistant Attorney General, Heber M. Wells Building, 160 East 300 South, 6th Fl., Salt Lake City, Utah 84114.